84-914 (1)

No.



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

ST. LOUIS SOUTHWESTERN RAILWAY CO.,
*Petitioner,*

vs.

ROBERT WAYNE DICKERSON,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS EASTERN DISTRICT

SHEPHERD, SANDBERG & PHOENIX, P.C.
JOHN C. SHEPHERD
GERALD D. MORRIS
PAUL N. VENKER
Suite 3000
One Mercantile Center
St. Louis, Missouri 63101
314/231-3332

and

JOHN J. CORRIGAN
General Solicitor
Southern Pacific Transportation Co.

*Counsel for Petitioner*
*St. Louis Southwestern*
*Railway Company*

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

## QUESTIONS PRESENTED FOR REVIEW

I. THE MANDATORY INSTRUCTION SYSTEM OF THE MISSOURI SUPREME COURT PROHIBITS GIVING A PRESENT VALUE INSTRUCTION TO THE JURY IN AN FELA CASE, CONTRARY TO THE DECISIONS OF THIS COURT AND THE UNITED STATES COURTS OF APPEALS. THEREFORE, THE MISSOURI COURT OF APPEALS IN *DICKERSON V. ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,* 674 S.W.2d 165 (MO. APP. 1984), PREJUDICIALLY ERRED IN FOLLOWING THE MISSOURI SUPREME COURT'S MANDATE AND SUSTAINING THE TRIAL COURT'S REFUSAL OF THE PRESENT VALUE INSTRUCTION WHICH PETITIONER TENDERED IN THIS CASE.

II. THE MISSOURI COURT OF APPEALS IN *DICKERSON V. ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,* 674 S.W.2d 165 (MO. APP. 1984) ERRONEOUSLY DENIED PETITIONER EQUAL PROTECTION UNDER THE LAW BECAUSE IT OBEYED THE MISSOURI SUPREME COURT'S REQUIREMENT OF THE EXCLUSIVE USE OF ITS MISSOURI APPROVED INSTRUCTION 8.02,THE JURY INSTRUCTION FOR DAMAGES IN PERSONAL INJURY FELA CASES, BECAUSE M.A.I. 8.02 DOES NOT REQUIRE A PROXIMAL RELATIONSHIP BETWEEN THE DEFENDANT'S CONDUCT AND PLAINTIFF'S DAMAGES WHEREAS ALL OTHER MISSOURI APPROVED INSTRUCTIONS ON DAMAGES DO HAVE THIS REQUIREMENT.

III. THE MISSOURI COURT OF APPEALS IN *DICKERSON V. ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,* 674 S.W.2d 165 (MO. APP. 1984) ERRED IN AFFIRMING THE ONE MILLION DOLLAR JURY AWARD AS NOT EXCESSIVE BECAUSE THE EVIDENCE DID NOT

WARRANT AN AWARD OF SUCH MAGNITUDE AND BECAUSE RESPONDENT'S COUNSEL MADE IMPERMISSIBLE CLOSING ARGUMENT REGARDING THE VALUE OF ANY AWARD AND FURTHER BECAUSE THE PETITIONER WAS NOT PERMITTED TO SUBMIT A PRESENT VALUE INSTRUCTION TO THE JURY.

## LIST OF PARTIES

In compliance with Rule 28, Petitioner states the following:

Petitioner St. Louis Southwestern Railway Company owns directly a portion of the capital stock of the following companies:

1. Alton & Southern Railway Company
2. Arkansas & Memphis Railway Bridge & Terminal Company
3. Kansas City Terminal Railway Company
4. Southern Illinois Railway & Bridge Company
5. Terminal Railroad Association of St. Louis
6. Trailer Train Company, Inc.

Over ninety-nine percent of the stock of the St. Louis Southwestern Railway Company is owned by the Southern Pacific Transportation Company. The stock of the Southern Pacific Transportation Company is owned by the Santa Fe Southern Pacific Company.



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# No.

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## PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS EASTERN DISTRICT

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### JURISDICTIONAL STATEMENT

St. Louis Southwestern Railway Company (hereafter referred to as Petitioner), filed this Petition for Writ of Certiorari subsequent to an adverse verdict in the Circuit Court of the City of St. Louis in an action brought under 45 U.S.C. §51 et. seq. (F.E.L.A.). Petitioner appealed to the Missouri Court of Appeals, Eastern District and that court affirmed the jury verdict in *Dickerson v. St. Louis Southwestern Railway Company,* 674 S.W.2d 165 (Mo. App. 1984). Petitioner properly filed with the Court of Appeals a Motion for Rehearing and in the alternative an Application for Transfer to the Missouri Supreme Court. After the Court of Appeals denied those motions (Appendix C), Petitioner filed an Application for Transfer with the Missouri Supreme Court pursuant to Rule 83.03 (Appendix K).

On September 11, 1984, the Missouri Supreme Court denied Petitioner's Application for Transfer. (Appendix B). Petitioner has ninety (90) days to file its Petition for Writ of Certiorari with this Court. Therefore this Petition is timely filed. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3). The questions presented involve the invalidity and unconstitutionality of certain pattern, mandatory jury instruction promulgated by the Missouri Supreme Court (Missouri Approved Instructions)[1] for FELA cases and a resultant excessive verdict and the Court of Appeals' decision in this case because it is contrary to the decisions of this Court and the Federal Courts of Appeal.

## CONSTITUTIONAL PROVISIONS

### Constitution of the United States

### Amendment 14

**Section 1. Citizens of the United States.**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

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[1] M.A.I. is an acronym for Missouri Approved Instruction. The Missouri Supreme Court promulgates mandatory pattern jury instructions. The court is aided by the M.A.I. Committee.

**Missouri Constitution, Article I, §2**

**Promotion of general welfare—natural rights of persons —equality under the law—purpose of government**

Section 2. That all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry; that all persons are created equal and are entitled to equal rights and opportunity under the law; that to give security to these things is the principal office of government, and that when government does not confer this security, it fails in its chief design.

## STATEMENT OF THE CASE

Although the *Dickerson* opinion, (see Appendix A) sets out in detail the factual accounts of the event in question, Petitioner will sketch a brief factual summary thereof. This case was tried in December, 1982. The injured railroad worker, Mr. Dickerson was thirty years old when he was allegedly injured on December 11, 1978. At that time Respondent Dickerson was a railroad policeman and was climbing on multi-level railroad cars which were loaded with Cadillac automobiles. His purpose was to inspect them for possible vandalism. In climbing from one level to the next on one of the cars, Respondent fell to the ground and landed on his back. He brought suit under the Federal Employers Liability Act (hereafter FELA) against St. Louis Southwestern Railway Company, his employer, alleging that the railroad had failed to provide him: (1) reasonably safe work conditions, (2) reasonably safe appliances, (3) reasonably safe methods of work, and (4) reasonably adequate help. Pursuant to a verdict directing instruction submitting to the jury the issues whether Petitioner either failed to provide reasonably safe conditions for work or reasonably safe methods for work, the jury found for plaintiff and awarded him $1,000,000.00 in damages.

Petitioner filed a timely motion for new trial but the trial court denied that motion. Petitioner appealed to the Missouri Court of Appeals, Eastern District which affirmed the judgment in *Dickerson v. St. Louis Southwestern Railway Company,* 674 S.W.2d 165 (Mo. App. 1984). Petitioner then filed with the Court the Motion for Rehearing and in the alternative an Application for Transfer to the Missouri Supreme Court which were both denied. (Appendix C). Petitioner next filed an Application for Transfer with the Missouri Supreme Court, seeking review of the *Dickerson* opinion. On September 11, 1984, the Missouri Supreme Court denied the Application for Transfer. (A copy of the order is contained in Appendix B).

The issues raised herein concern Missouri jury instructions practice as required by the Missouri Supreme Court and an excessive verdict resulting therefrom. Under Missouri Supreme Court Rule 70.02 (see Appendix D) it is clear that Missouri Approved Instructions are mandatory and are to be used to the exclusion of any others. For purposes of clarity, each of these issues addressed will be set out hereunder with separate headings with additional facts set out in the Argument where appropriate.

**Present Value Instruction**

At the instruction conference, counsel for Petitioner tendered, and the court refused, an instruction to have the jury reduce the award to its present value. (See Appendix E for the instruction conference transcript and see Appendix F for the text of this instruction, marked as Instruction G, which the trial court refused). In accordance with Missouri Supreme Court Rule 70.03, Petitioner raised in its Motion for New Trial the fact that it had tendered a present value instruction and that it was refused. (See Appendix G, Paragraph 10). Petitioner also there argued that to refuse to give a present value instruction was erroneous because the Petitioner was entitled to have the jury consider the present value rule under controlling federal law. The

trial court denied the Motion for New Trial. (See Appendix H). Petitioner then raised the issue in the Missouri Court of Appeals, Eastern District where the point was ruled against it. *Dickerson, supra,* 674 S.W.2d at 171. (See Appendix A). Subsequent to that decision, Petitioner filed an Application for Transfer with the Missouri Supreme Court and there raised the issue again. (See Appendix I for points of error raised in the courts below). That court denied the Application for Transfer on September 11 (see Appendix B for the court order).

**Difference In Causal Requirement For Damages In FELA Personal Injury Cases Denies Petitioner Equal Protection**

In its Motion for New Trial, defendant raised the fact that M.A.I. 8.02 [the damages instruction for FELA personal injury cases] deprived it of equal protection under the law of the United States Constitution and the Missouri Constitution. (See Appendix G, para. 12). This is because the Missouri Supreme Court, through its Missouri Approved Instructions, requires that the plaintiff's damages directly result from the plaintiff's injuries in all cases except for FELA cases involving personal injury (as opposed to wrongful death). There is no rational distinction here and this results in Petitioner's being denied equal protection under the law. Petitioner raised this point of error in its Motion for New Trial (see Appendix G, paragraph 12). The Missouri Court of Appeals, Eastern District, in *Dickerson* ruled against Petitioner on this point. 674 S.W.2d, at 171. (see Appendix A). The Missouri Supreme Court refused to review that determination when it denied Petitioner's Application for Transfer on September 11, 1984. (Appendix B).

**The Excessive One Million Dollar Verdict In This Case Resulted From Erroneous Missouri Approved Instruction System**

The verdict and judgment in this case was One Million Dollars ($1,000,000.00). Respondent, at the time of trial, was

thirty-four years of age. His past wage loss from the date of the injury to the time of trial was allegedly Sixty-Three Thousand One Hundred Eighty Dollars Thirty-Three Cents ($63,180.63). In January, 1983 plaintiff purportedly would have earned Twenty-Four Hundred Dollars ($2,400) per month and he provided evidence that he could work until he was sixty-five to seventy years of age. His total claimed wage loss was Nine Hundred Two Thousand Six Hundred Twenty Dollars ($902,620.00) if he worked until he was sixty-five, and One Million Fifty-One Thousand Four Hundred Twenty Dollars ($1,051,420.00) if he worked until he was seventy. Additional facts will be set out in the argument portion for this issue. This point of error was timely raised in Petitioner's Motion for New Trial (Appendix G, para. 28, 29).

## REASONS FOR GRANTING THE WRIT

**I. The Mandatory Instruction System Of The Missouri Supreme Court Prohibits Giving A Present Value Instruction To The Jury In An FELA Case, Contrary To The Decisions Of This Court And The United States Courts Of Appeals. Therefore, The Missouri Court Of Appeals In *Dickerson v. St. Louis Southwestern Railway Company*, 674 S.W.2d 165 (Mo. App. 1984), Prejudicially Erred In Following The Missouri Supreme Court's Mandate And Sustaining The Trial Court's Refusal Of The Present Value Instruction Which Petitioner Tendered In This Case.**

It is undisputed that the issue of damages in an FELA case is governed by federal law to the exclusion of state law on that issue. *Norfolk & Western Railway v. Liepelt,* 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980). In 1916, this Court held that an FELA defendant has a right as a matter of federal law, to an instruction telling the jury that they are to award damages on the basis of present value only. *Chesapeake & Ohio Railway Company v. Kelly,* 241 U.S. 485, 491, 36 S.Ct. 630, 60 L.Ed. 1117 (1916). The viability of *Kelly* was very recently recognized by this Court in *Jones and Laughlin Steel Corporation v. Pfeifer,* ____ U.S. ____, 76 L.Ed2d 768, 103 S.Ct. 2541 (1983) where it stated:

> It has been settled since our decision in *Chesapeake & Ohio R.C. v. Kelly,* [citation omitted], that in all cases where it is reasonable to suppose that interest may be safely earned upon the amount that is awarded, the ascertained future benefits ought to be discounted in the making up of the award.

____ U.S. ____, 76 L.Ed. 2d at 783, 103 S.Ct. ____.

The theory underlying this is the plaintiff's duty to mitigate the amount of his damages and in these circumstances he could certainly do so by placing the money in an interest bearing ac-

count. *Chesapeake & Ohio R. Co., supra,* 241 U.S. at 489; *Jones & Laughlin Steel Corp. v. Pfeifer,* 76 L.Ed.2d, at 783, n.20. *Kelly* has not been overruled, and has been cited in countless cases dealing with the present value instruction issue. Moreover, Petitioner has yet to find a case which affirms a verdict where a proper present value instruction was requested and refused and where the jury rendered its verdict without any present value instruction being given. For example, in *Beanland v. Chicago Rock Island & Pacific Railroad Company,* 480 F.2d 109 (8th Cir. 1973), the Eighth Circuit Court of Appeals, citing extensive authority, held that failure to give a present value instruction in an FELA case was prejudicial error. 480 F.2d at 115. The *Beanland* court relied directly on *Kelly, supra,* in reversing the case because no present value instruction of any kind was given. 480 F.2d at 114. *Beanland* also cited *Sleeman v. Chesapeake & Ohio Railway Company,* 414 F.2d 305 (6th Cir. 1969), where no present value instruction was given and the court remanded the case for a recomputation of the damages based on the *Kelly* "present worth formula." 480 F.2d at 115. Nor does there need be any intricate formula submitted to the jury to aid them in arriving at present value - they can properly apply the rule upon being told that the award should be only present money value. *Duncan v. St. Louis-San Francisco Railway Company,* 480 F.2d 79, 87 (8th Cir. 1973), *cert. denied,* 414 U.S. 859, 38 L.Ed.2d 109, 94 S.Ct. 69 (1973). *Heater v. Chesapeake & Ohio Railway Company,* 497 F.2d 1243 (7th Cir. 1974), *cert. denied,* 419 U.S. 1013, 42 L.Ed. 287, 95 S.Ct. 333 (1974).

In denying Petitioner's claim of error of the trial court's refusal to give the tendered present value instruction, the Missouri Supreme Court made clear that its position is that the M.A.I. scheme or system does not allow for a present value instruction and therefore Missouri juries cannot be instructed on the present value issue. *Dickerson v. St. Louis Southwestern Railway Company,* 674 S.W.2d 165 at 171 (See Appendix A);



*see also, Bair v. St. Louis San-Francisco Railway Company,* 647 S.W.2d 507, 510[2] (Mo. banc 1983). Given that the unanimous weight of authority is that if requested, the present value instruction must be given, the Missouri courts are clearly contrary to opinions of this Court, notably that in *Kelly, supra,* and *Jones & Laughlin Steel Corp., supra.*

Moreover, the instruction tendered here was adequate and acceptable under *Kelly,* because it would merely have informed the jury as follows:

> If you find in favor of plaintiff and decide to make an award for any loss of earning in the future, you must take into account the fact that the money awarded by you is being received all at one time instead of over a period of time extending into the future and that plaintiff will have the use of this money in a lump sum. You must therefore determine the present value or present worth of the money which you award for such future loss.

(This was Instruction No. G tendered by Petitioner to the trial court, but refused by that court. See Appendix F). The instruction is short and straightforward and embodies the concept of mitigation of damages articulated in *Chesapeake & Ohio Railway Company v. Kelly, supra* and *Jones & Laughlin Steel Corp. v. Pfeifer,* ____ U.S. ___, 76 L.Ed.2d 768, 103 S.Ct. 2541, (1983). See also, *Gulf, C. & S.F. R. Co. v. Moser,* 275 U.S. 133, 135-136, 72 L.Ed. 200, 201-202 (1927) (exemplar instruction set out). The tendered instruction is a correct statement of the law. The reason for its refusal by Missouri Courts is merely that they refuse to include it in the required Missouri damage instructions. This refusal is plainly contrary to this Court's decisions and is prejudicial to FELA defendants sued in Missouri state court.

Petitioner tendered a proper present value instruction, had it refused by the trial court, objected to that refusal, and has properly preserved its objection up through the appellate process to

this Court. This point of error involves a fixed, substantive right for FELA defendants under federal law and should not be resolved against Petitioner merely because the appellate courts of Missouri refuse to follow controlling federal law. Therefore, Petitioner prays this Court to issue its Writ of Certiorari on this point of error and to order a retrial in this case with Petitioner having the right to submit a present value instruction to the jury.

**II. The Missouri Court Of Appeals In *Dickerson v. St. Louis Southwestern Railway Company*, 674 S.W.2d 165 (Mo. App. 1984) Erroneously Denied Petitioner Equal Protection Under The Law Because It Obeyed The Missouri Supreme Court's Requirement Of The Exclusive Use Of Its Missouri Approved Instruction M.A.I. 8.02, The Jury Instruction For Damages In Personal Injury FELA Cases, Because M.A.I. 8.02 Does Not Require A Proximal Relationship Between The Defendant's Conduct And The Plaintiff's Damages Whereas All Other Missouri Approved Instructions On Damages Do Have This Requirement.**

In the case at bar, the trial court gave M.A.I. 8.02 (modified for this case), marked as Instruction No. 9, which provides as follows:

> If you find the issues in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe he sustained and is reasonably certain to sustain in the future *as a result* of the fall on December 11, 1978, mentioned in the evidence. Any award you make is not subject to income tax.
>
> If you find plaintiff contributorily negligent as submitted in Instruction No. 8, then you must diminish the sum in proportion to the amount of the negligence attributable to plaintiff. (emphasis added).



M.A.I. 8.02 (the damages instruction for FELA personal injury cases). The M.A.I. Committee's Comment to M.A.I. 8.02 states that the instruction is the same as the ordinary negligence damage instruction (M.A.I. 4.01) except that the word "direct" has been removed as a modifier of "result." (See Appendix J for the Committee Comment to 8.02). This was done, the Committee explains in the Comment, to comport with federal substantive law of the FELA. On the contrary, Petitioner submits that present M.A.I. 8.02 is a gross and prejudicial departure from federal law.

This action by the Missouri Supreme Court through its M.A.I. Committee shows that the Court is erroneously blurring together the two separate issues of (1) an FELA employer's threshhold liability for injuries sustained, and (2) the damages [directly] caused by the injury. With an obvious purpose, the FELA alters the causation component of common law negligence and reduces the question of an FELA employer's liability to whether any negligent acts by the employer played any part in the employee's injury. *Crane v. Cedar Rapids and I.C. Railway Co.*, 395 U.S. 164 (1969); *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 506-507 (1957). However, this statutorily created standard of causation is designed only to aid the FELA plaintiff on the threshhold issue of liability. Certainly, a plaintiff is entitled only to damages which he can prove were directly or proximately caused by the injury for which he is suing. *Holladay v. Chicago, Burlington and Quincy Railroad Co.*, 255 F.Supp. 879, 887 (D.C. Iowa 1966).

The United States Supreme Court has shown that its members clearly perceive the distinction between these two aspects of this issue; in *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 506-507, the court said:

> [T]he test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. (Footnote omitted).

*Rogers v. Missouri Pacific Railroad Co.,* 352 U.S. 500, 1L.Ed.2d 493, 77 S.Ct. 443, 77 S.Ct. 443 (1957). The soundness of the proposition that proximate cause is still required between the injury sued for and the alleged damages is almost too obvious to require citation. Many cases have expiicitly held it applies in FELA cases. *E.g., Chesapeake & Ohio Railway v. Carnahan,* 241 U.S. 241, 244-245, 60 L.Ed. 979, 36 S.Ct. 594 (1916); *Shupe v. New York Central System,* 339 F.2d 998 (7th Cir. 1965) cert. denied 381 U.S. 937, 14 L.Ed.2d 701, 85 S.Ct. 1769 (1965); *Harris v. Norfolk Southern Railway,* 319 F.2d 493 (4th cir. 1963) cert. denied 375 U.S. 985, 11 L.Ed.2d 473, 84 S.Ct. 517 (1964); *Holladay v. Chicago, Burlington and Quincy Railroad Co.,* 255 F.Supp. 879, 887 (S.D. Iowa 1966).

Most all jurisdictions realistically accommodate the proximate cause issue for damages. Some utilize separate instructions on causation and/or separate instructions on each element of damage. *E.g.,* see Illinois Pattern Jury Instructions-Civil (2nd Ed. 1971). Prior to the M.A.I. system in Missouri, the damage instruction could at least specify each proper element of damage for the jury's consideration. *E.g., Pierce v. New York Central Railway Company,* 257 S.W.2d 84, 89 [8] (Mo. 1953). Some jurisdictions use special verdicts or interrogatories for the jury. *E.g., Gallick v. Baltimore & Ohio Railway Co.,* 372 U.S. 108, 9 L.Ed.2d 618, 83 S.Ct. 659 (1963). Such approaches limit the jury to considering only proper elements of damage when determining an award. Any of these approaches would be better than that which the State of Missouri has in its M.A.I. which permits the jury to engage in the broadest kind of speculation and conjecture.

The Missouri Supreme Court's position that federal law does not require that damages directly or proximately result from the injury is a misstatement of substantive federal law as to damages under the FELA. The United States Supreme Court has stated that such a causal relation must exist. *See, Chesapeake & Ohio Railway Co. v. Carnahan,* 241 U.S. 241, 244-245, 60 L.Ed. 979 (1916). This erroneous declaration of



federal law by the highest court of a state certainly constitutes grounds for allowing a writ of certiorari to issue. *Seaboard Air Line Ry. v. Padgett,* 236 U.S. 668, 35 S.Ct. 481, 59 L.Ed. 777 (1915).

What is most alarming here is that in the legal philosophy of the Supreme Court of Missouri, the absence of the adjective "direct" in a damage instruction (in all but an FELA case) is prejudicially erroneous because it allows a jury to speculate and consider damage indirectly caused. To this effect, the Missouri Supreme Court has stated:

> The deletion of the word "direct" as a modifier of "result" changes the meaning of the instruction. Damages sustained as the result of an occurrence would include all such damages, whether resulting directly or indirectly. Only if the word "direct" is kept in the instruction is the jury told that the damages which it may award must be the direct result of the occurrence. The word "direct" adds a limiting factor not otherwise included.

*Brown v. St. Louis Public Service Co.,* 421 S.W.2d 255, 257 (Mo. banc 1957); *See also Chappell v. City of Springfield,* 423 S.W.2d 810, 812 (Mo. 1968) (citing *Brown, supra*). Therefore, as the Missouri Supreme Court sees it, in all except FELA cases, failure to use the adjective "direct" to modify "result" in instructing a jury on the proper scope of damages, is to erroneously and prejudicially allow that jury to consider elements of damage not directly or proximately resulting from plaintiff's injury which was caused by the defendant's acts. Yet, the Missouri Supreme Court finds the omission of the word "direct" is not only proper, but *required,* by federal law when instructing the jury on damages in an FELA case.

There are at least two substantial and injurious ramifications of the present language in M.A.I. 8.02. First, an FELA plaintiff's burden of proof on damages is altered by making it less than the burden intended by Congress and less than it has been interpreted to be by the United States Supreme Court. Second,

FELA defendants are erroneously subjected to a jury's propensity to speculate and the instruction permits them to make awards on the basis of damages not proximately caused by the injury for which plaintiff seeks recovery.

There is yet another prejudice that results from the fact that M.A.I. 8.02 fails to require a direct or proximate causal link between a plaintiff's injuries and his damages—the denial of equal protection under the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States and by Article I, §2, of the Missouri Constitution. By contrast, M.A.I. 8.01 (the damages instruction for FELA wrongful death cases) does require that a plaintiff's damages directly result from his injuries. Therefore, personal injury FELA defendants are the only Missouri defendants discriminated against by being denied a "direct" causal link between a plaintiff's injury and damages. M.A.I. 8.01 provides in pertinent part as follows:

> 8.01 Damages - Death of Employee Under FELA.
>
> If you find in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate (list the beneficiary; *i.e.,* the widow, minor children, parents, ets.) for (her, his, their) losses which can reasonably be measured in money which you believe (she, he, they) sustained as a *direct* result of the death of (name of decedent) [and if you believe decedent endured pain and suffering *directly* resulting from his injuries then in addition you must add to such sum an amount that would fairly and justly compensate a decedent for such pain and suffering]. . .(footnotes omitted) (emphasis added).

The text of M.A.I. 8.02 was set out above, it contains neither "direct" nor "directly."

It is well settled that a classification created by state action is violative of the equal protection clause unless it is reasonable and bears a rational relation to the ends of the act. *Weber v. Missouri State Highway Commission,* 639 S.W.2d 825, 829-830 (Mo. 1982). There is no reason in case law or logic to



distinguish the requisite causal connection for damages in an FELA personal injury case from that in an FELA wrongful death case or non-FELA case. Moreover, there is no reason to distinguish between these two situations on the issue of losses which can be measured in money, which is included in the wrongful death instruction, but is not included in the personal injury instruction. Furthermore, since the question of damages in FELA cases is one of federal law, personal injury FELA defendants are being denied equal protection under the law by the Missouri Supreme Court. As a practical matter, comparison of M.A.I. 8.01 and 8.02 and non-FELA damages instructions of the M.A.I. shows that the Missouri Supreme Court misunderstands the FELA on the issue of required causal connection between the injury and damage claimed to result therefrom as well as what the proper elements of damages are. Petitioner asserts that this misunderstanding denies it rights under federal law and discriminates unconstitutionally between personal injury FELA defendants on the one hand and wrongful death FELA defendants and non-FELA defendants on the other.

For these reasons, defendant St. Louis Southwestern Railway Company requests this court to reverse the case below and to remand it with an order for the trial court to submit M.A.I. 8.02 modified as pointed out above.

**III. The Missouri Court of Appeals In *Dickerson v. St. Louis Southwestern Railway Company,* 674 S.W.2d 165 (Mo. App. 1984) Erred In Affirming The One Million Dollar Jury Award As Not Excessive Because The Evidence Did Not Warrant An Award Of Such Magnitude And Because Respondent's Counsel Made Impermissible Closing Argument Regarding The Value Of Any Award And Further Because The Petitioner Was Not Permitted To Submit A Present Value Instruction To The Jury.**

The record shows that Respondent's injuries were serious but not totally disabling as argued. Respondent had a history of

back problems. When he was 17 years old in 1965, Respondent fell on his back and was hospitalized for three days. He was subsequently hospitalized again in Centreville, Illinois for that injury. He later was injured in an auto collision when he was in a car that was rear-ended. In 1969, he consulted Dr. Frank A. Palazzo, a neurosurgeon, about his back. Dr. Palazzo prescribed a lumbosacral belt for Respondent to wear, and had him undergo a myelogram. Respondent also admitted that when he worked at the General Motors' plant in the early 1970's he fell off a material rack onto his back.

Respondent also had a history with regard to his depression which he claimed was a result of the December, 1978 incident. When he was 13 years of age he went to hospitals on two different occasions for nerves and anxiety in September and November of 1961. Therefore, Respondent has had a history of being depressed and it is clear that the accident alone is not the cause of his depression, but rather merely a circumstance which provides a focal point for his general depression.

Furthermore, Petitioner wrote Respondent a letter and informed him that if he could do the work, he could return to the railroad at his previous job. As well, the railroad employed Respondent on light duty—a job different from railroad policeman—until March of 1981 at regular pay. There was also expert testimony that Respondent would recover and that he was not totally disabled and, therefore, could work in a job which was sedentary in nature.

This excessive verdict resulted from passion and prejudice of the jury. Respondent was allowed to put to the jury evidence of his depression because he allegedly could not have a normal life with his wife and cannot play with his children. As recorded in the *Dickerson* opinion (see Appendix A), this evidence obviously goes beyond the permissible scope of FELA damages of reasonably certain pecuniary loss and into the areas of consortium. In addition, and most aggregious, Respondent argued to the jury that they could take into account that he would get a five percent annual increase in salary when awarded money for



lost wages (see Appendix L for a copy of the transcript of this argument). This terribly inflated the figure prayed for by 100%—Respondent's counsel himself attempted to put a $2 million figure before the jury with this formula being used.

Is this verdict excessive? Consider that this one million dollar ($1,000,000) verdict if conservatively invested in tax-exempt bonds at ten percent annual interest could earn one hundred thousand dollars ($100,000) per year. This is much more than the thirty-five thousand dollars ($35,000) (before taxes) per year Respondent was earning while working for the railroad and is much more than he could ever hope to earn there. Remember too, that this $100,000 per year is merely interest and the $1,000,000 principal is not depleted by one penny.

The major factor in this excessive verdict is that the jury was improperly instructed in that no present value instruction was permitted due to the Missouri instruction practice prohibiting it. This prejudice was heightened by Respondent's argument that the jury could consider that his salary would increase at an annual rate of five percent (Appendix L contains the transcript setting this out). Petitioner objected to this argument at trial and raised the point of error in its Motion for New Trial (Appendix G, para. 26). The Court of Appeals denied this point on appeal. *Dickerson, supra,* 674 S.W.2d at 170 [5]. (See Appendix A). As pointed out above, under this view, plaintiff's wage loss would have been $2,000,000.

Although FELA defendants are told by Missouri courts that they may argue to the jury that they should reduce their verdict to present value, *Bair v. St. Louis San-Francisco Ry. Co.*, 647 S.W.2d 507, 513 [12] (Mo. banc 1983), those courts also allow the plaintiff to tell the jury that they should inflate their verdict, as was the case here. Without an instruction on present value to submit to a jury, how would they ever know that is the law they must follow? In most every trial a jury is told that the court gives them the law in the form of the instructions and they are

told that what lawyers say is neither the law nor evidence. Can Missouri courts in any way be following this Court's mandate when they hold that defendants may argue present value to a jury but may not have an instruction to that effect?

The time has come for this Court to make clear to the Missouri Supreme Court that it must follow decisions of the United States Supreme Court and that it must allow FELA defendants to give a present value instruction to juries.

## CONCLUSION

For all the above reasons, Petitioner requests this Court to issue its Writ of Certiorari to the Missouri Court of Appeals, Eastern District, and to provide relief sought by Petitioner.

Respectfully submitted,

SHEPHERD, SANDBERG &
PHOENIX, P.C.
John C. Shepherd
Gerald D. Morris
Paul N. Venker
Suite 3000
One Mercantile Center
St. Louis, Missouri 63101
314/231-3332
Counsel for Petitioner
St. Louis Southwestern
Railway Company

and

John J. Corrigan
General Counsel
Southern Pacific Transportation
Company

# APPENDIX

## APPENDIX A

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

DIVISION ONE

No. 46998

Robert Wayne Dickerson,
Plaintiff-Respondent,

vs.

St. Louis Southwestern Railway Company,
Defendant-Appellant.

Appeal from the Circuit Court
of the City of St. Louis

Hon. Ivan Lee Holt, Jr.,
Judge

OPINION FILED: June 5, 1984

Plaintiff-respondent Robert Wayne Dickerson obtained a jury verdict and judgment for $1,000,000 against defendant-appellant St. Louis Southwestern Railway Company. Respondent was injured when he fell from a railroad car and landed on his buttocks and low back on the ballast rock below. He sued the railroad for his injuries pursuant to 45 U.S.C.A. Section 51 et seq., commonly known as the Federal Employer's Liability Act (FELA). The railroad appeals. The judgment is affirmed.

Appellant contends the trial court erred: (1) in overruling its objections to respondent's reference in opening statement to, and evidence of, the "blue flag rule;" (2) in refusing to submit appellant's tendered present value instruction; (3) in denying appellant's motion for new trial because of respondent's allegedly improper argument regarding the computation of

damages; (4) in submitting a modified form of MAI 8.02, the damage instruction; (5) in submitting MAI 8.02 as the damage instruction because MAI 8.02 allows the jury to speculate as to damages; (6) in submitting MAI 8.02 because MAI 8.02 deprived appellant of equal protection under the law; (7) in refusing to submit appellant's Instruction H, which would have instructed the jury not to speculate as to damages; (8) in submitting MAI 24.01 as the verdict directing instruction; (9) in denying appellant's motion for a mistrial when the jury allegedly saw respondent's wife help him up from a supine position on a courtroom bench; (10) in overruling appellant's objection to testimony about appellant's depression; (11) in overruling appellant's objection to respondent's closing argument which allegedly improperly injected the issue of punitive damages; and (12) in overruling appellant's motion for a new trial because the jury's verdict was allegedly excessive.

Respondent Robert Dickerson at the time of trial was a thirty-four year old man with a wife and two young sons. Before the accident in question, he enjoyed a normal relationship with his wife, who described her husband as a relatively happy man. In addition respondent had also enjoyed such family activities as camping, hiking, fishing, and watching his sons play baseball.

In 1972, at the age of 24, respondent began working as a railroad policeman for appellant. A railroad policeman performs basically the same function for the railroad as a municipal police officer performs for his city or county. In particular, railroad policemen inspect railroad cars for possible theft, vandalism, damage, or burglary. Appellant employed respondent at the Valley Junction railroad yard in East St. Louis, Illinois.

On December 11, 1978 at 7:35 p.m. a train known as CRBY 6014 rolled into Valley Junction. The train had two engines and one hundred cars. Respondent hopped onto the forty-third car from the rear in order to inspect its cargo of Cadillac automobiles. As he was climbing from the first, or A, level to



the second, or B, level of the railroad car, he slipped and fell to the ground, landing on his back on the ballast rock below. Respondent maintains that the train moved while he was attempting to climb from one level to the next.

Respondent injured his lower back as a result of the fall. Respondent has been hospitalized several times and undergone several operations on his back since his fall, but he is nonetheless in constant pain and cannot lie down, sit or stand for extended periods of time. Respondent can no longer enjoy the outdoor activities in which he used to participate with his family, such as hiking, camping, fishing, water skiing, working around his farm and going to ball games. His personnal relationship with his wife has deteriorated. Respondent, although once a happy man, is now irritable, depressed and unhappy.

In addition, respondent's evidence showed that he was totally and permanently disabled. Appellant produced the testimony of one physician who indicated that appellant could perform a sedentary job, but this physician could not name any one specific job for which respondent was suited.

Appellant also produced evidence which tended to show that respondent had injured his back before the fall from the railroad car, but respondent testified that he was in good health prior to the accident and shortly before his fall had completed a training course for appellant in Oakland, California which involved rigorous physical exercise. He earned a grade of A in this course and graduated with honors.

Respondent predicated his theory that appellant negligently failed to provide reasonably safe conditions or methods of work on three grounds. First, appellant was negligent for failing to give railroad policemen the protection of its "blue flag" rule. According to the evidence, whenever a workman is working on a train, he places a blue flag or signal at each end of the train and removes it when he is finished. The train may not move until the blue flag is removed and only the workman who put the

blue flag down may remove it. The blue flag rule did not apply to railroad policemen because, according to the railroad, requiring the policemen to put down a blue flag would hamper their ability to apprehend thieves and vandals on the trains.

Second, respondent alleged that appellant was negligent in forbidding radio communications between the train crew and the railroad policemen. Respondent testified that, although he was equipped with a radio so that he could listen to transmissions between the railyard operator and the conductor and engineer, the railroad forbade him to notify the conductor or engineer that he was on the train. Appellant produced testimony that, although communication between railroad police officers and the train's crew was not required, there was no rule forbidding such communication.

Third, respondent maintained that there was insufficient clearance between the treads of the ladder which led from one level of the railroad car to the next and the side of the car. The clearance was between two and two and a half inches wide and according to respondent did not provide enough toe room for a worker climbing the ladder. Appellant relied on the federal government's minimum standards, which the steps met, as evidence of no negligence.

After hearing the evidence, the jury awarded respondent $1,000,000.

Appellant first contends that the trial court erred in allowing evidence regarding the blue flag rule because respondent did not plead the blue flag rule as a theory of recovery, thereby surprising appellant at trial. The contention has no merit.

Respondent's first amended petition alleges that appellant "failed to provide reasonably safe methods of work." The pattern instruction for FELA cases, MAI 24.01, sets forth the employer's failure to provide reasonably safe methods of work as one dereliction from which the jury may infer the employer's



negligence. Thus, respondent pleaded the ultimate fact in issue and the pleading thus states one basis for liability. See *Fish v. Fish,* 307 S.W.2d 46, 51 (Mo. App. 1957). That appellant did not give its policemen the protection of the blue flag rule is arguably a failure to provide a reasonably safe method of work.

Although respondent pleaded an ultimate fact, the allegation is a broad generalization. Appellant could have learned more detailed facts by filing a motion for a more definite statement. As a matter of fact, the railroad itself pleaded as an affirmative defense that "Plaintiff inspected the cars of the train without being certain that the train was blue flagged."

The legal file contains a minute entry indicating that appellant filed a motion for more definite statement which was overruled; neither the motion nor the trial court's ruling, however, has been made a part of the record on appeal. Nor has appellant contended the trial court erred in overruling the motion.

This court is confined to the record as presented to it, see *Williams v. Clean Coverall Supply Co., Inc.,* 613 S.W.2d 659, 664[10] (Mo. App. 1980), and will not speculate as to the contents of motions not filed as part of the record. Any contention, if there ever was one, that appellant was entitled to a more definite statement, has been waived. See *State ex rel. State Highway Commission v. City of St. Louis,* 575 S.W.2d 712, 724[17,18] (Mo. App. 1978). Any indefiniteness in the amended petition was cured by the jury's verdict. See *Moschale v. Mock,* 591 S.W.2d 415, 418[4,5] (Mo. App. 1979).

Appellant next asserts the trial court erred in refusing to submit to the jury a present value instruction.[1] The Missouri

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INSTRUCTION NO. G

[1] If you find in favor of Plaintiff and decide to make an award for any loss of earnings in the future, you must take into account the fact that the money awarded by you is being received all at one time instead of over a period of time extending into the future and that Plaintiff will have the use of this money in a lump sum. You must, therefore, determine the present value or present worth of the money which you award for such future loss.

Supreme Court has held that " . . . a present value instruction was not appropriate under MAI." *Bair v. St. Louis - Francisco* [sic] *Ry. Co.*, 647 S.W.2d 507, 510[2] (Mo. banc 1983); but cf. *Chesapeake & Ohio Railway Co. v. Kelly*, 241 U.S. 485, 36 S.Ct. 630, 60 L. Ed. 1117 (1916) (on writ of error to the Court of Appeals of Kentucky, the U.S. Supreme Court reversed and remanded the case because of the trial court's refusal to give a requested present value instruction). The point is denied.

Appellant's third contention is that the trial court erred in denying appellant a new trial when respondent's counsel argued to the jury that respondent's future wage loss could be calculated by increasing respondent's salary by 5% per year and by multiplying respondent's annual salary by the number of his employable years. After the remarks by respondent's counsel, appellant's counsel objected. The objections were sustained. No further relief was requested. This court will not fault the trial court for failing to sua sponte grant a mistrial. See *Griffith v. St. Louis - San Francisco R. Co.*, 559 S.W.2d 278, 281[5] (Mo. App. 1977). The third point is denied.

Appellant's fourth point relied on is that the trial court erred in submitting the damage instruction, Instruction No. 9, which was MAI 8.02 modified.[2] Appellant argues that the instruction is inapplicable here because the evidence did not disclose a dispute between the parties about which one of several events actually caused respondent's injury and because the instruction assumes that respondent indeed fell on December 11, 1978.

---

INSTRUCTION NO. 9

[2] If you find the issues in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe he sustained and is reasonably certain to sustain in the future as a result of the fall on December 11, 1978 mentioned in the evidence. Any award you make is not subject to income tax.

If you find plaintiff contributorily negligent as submitted in Instruction Number 8, then you must diminish the sum in proportion to the amount of the negligence attributable to plaintiff.



Appellant adduced evidence which tended to show that respondent's injury was caused to some extent by accidents other than the fall on December 11, 1978. Where there is a dispute in the evidence as to which of more than one event caused the plaintiff's injury, then MAI 8.02 should be modified to confine the jury's consideration of damages to the event asserted by the plaintiff as the basis for the defendant's liability. See *Russell v. Terminal Railroad Ass'n of St. Louis*, 501 S.W.2d 843, 847[2] (Mo. banc 1973); MAI 8.02, Notes on Use, Note 2.

Appellant's argument that the damage instruction erroneously assumes that respondent fell on December 11, 1978, is also unpersuasive. To hold that the modification of MAI 8.02 assumes a fact in issue would be tantamount to holding that the Notes on Use to that instruction were inapplicable and erroneous, because Note on Use 2 requires the specification of the date of the incident for which the railroad is responsible in all cases where more than one event is claimed to be the cause of the claimant's injury. The Notes on Use to the MAI must be followed where applicable. *Weinbauer v. Berberich*, 610 S.W.2d 674, 680[11] (Mo. App. 1980). The point is not well taken.

Appellant's fifth point contends the trial court erred in giving the jury Instruction 9 because the instruction allows the jury to speculate as to damages. Instruction 9 is an approved MAI instruction. This court is powerless to declare the submission of an applicable MAI instruction erroneous. Rule 70.02(b). Appellant's fifth point is denied.

Appellant argues next that the submission of MAI 8.02 deprives it of equal protection of the laws as guaranteed by the federal and state constitutions because wrongful death FELA defendants get the benefit of having the jury consider only pain and suffering *directly* resulting from the injuries of the decedent, MAI 8.01, whereas personal injury FELA defendants do not get the benefit of the word directly. The instruction is the

applicable MAI instruction. "This instruction [MAI 8.02] is mandatory to the exclusion of all others under the MAI." *Bair v. St. Louis - San Francisco Ry. Co.*, 647 S.W.2d 507, 510[3] (Mo. banc 1983). Point six is denied. Rule 70.02(b).

The seventh point is that the trial court erred in refusing to give the jury a speculative damage instruction.[3] The instruction is not in MAI. The Missouri Supreme Court has held that a non-MAI speculative damage instruction should not be given. *Bair v. St. Louis - San Francisco Ry. Co.*, 647 S.W.2d at 510[4]. Point seven is denied.

---

INSTRUCTION No. H

[3] You are not permitted to award the Plaintiff speculative damages by which term is meant compensation for future detriment which, although possible, is remote, conjectural or speculative. You can only award for future detriment if a preponderance of the evidence shows such a degree of probability of that detriment occurring as amounts to a reasonable certainty that it will result from the original injury in question.

In its eighth point, appellant alleges trial court error in the giving of Instruction 6,[4] because the instruction gives the jury a roving commission, i.e., the verdict director does not focus the jury's attention on any particular act or acts of negligence. The verdict director is the applicable instruction, MAI 24.01. Its use in the present case was mandatory. Rule 70.02(b). Moreover,

INSTRUCTION No. 6

[4] Your verdict must be for plaintiff if you believe:

First, defendant either failed to provide:
reasonably safe conditions for work, or
reasonably safe methods of work, and

Second, defendant in any one or more of the respects submitted in Paragraph First was negligent, and

Third, such negligence resulted in whole or in part in injury to Plaintiff.



the Missouri Supreme Court has rejected the "roving commission" argument. *Dunn v. St. Louis - San Francisco Ry. Co.*, 621 S.W.2d 245, 254-255 (Mo. banc 1981). Point eight is also denied.

Appellant next argues that the trial court erred in denying appellant's motion for a mistrial when the jury saw respondent's wife helping him up from a supine position on a courtroom bench. The point is denied for two reasons.

First, the record is devoid of any indication that the jury actually saw the incident of which appellant complains, other than the bare statement of appellant's trial counsel.

Second, whether to grant a mistrial is a matter within the sound discretion of the trial court. *Hoene v. Associated Dry Goods Corp.*, 487 S.W.2d 479, 485[11] (Mo. 1972). Here, no abuse of discretion has been shown.

The trial court was in a better position than this court to observe the effect which the alleged incident had on the jury, even assuming that it took place. Moreover, the jury had already been told during testimony that respondent needed to lie down on occasion in order to relieve the pain in his back. This court has read *Fitzpatrick v. St. Louis-San Francisco Railway Company*, 327 S.W.2d 801 (Mo. 1959), upon which appellant relies, and determines that the case is distinguishable on its facts. Point nine is denied.

Appellant next maintains that the trial court erred in overruling appellant's objections to testimony by respondent and his wife concerning respondent's depression.

Respondent testified that he was depressed because he could no longer play with his children, because his wife had to work to support the family and because he had heard that he was permanently disabled. There was also testimony that respondent feels depressed because he can no longer work on his farm and because he no longer has a normal relationship with his wife.

Appellant argues that this testimony is irrelevant because it related to the wife's loss of consortium, which is not compensable under FELA, and is too remote from damages properly recoverable for pain and suffering.

The parties agree that loss of consortium may not be recovered in an FELA action. Respondent, however, maintains that the testimony of which appellant complains is relevant to establish his pain and suffering from the December 11, 1978 fall.

The first issue is whether an FELA personal injury claimant may recover damages for emotional or mental after affects of an injury otherwise compensable under FELA. In *Adams v. Atchison, Topeka and Santa Fe Ry. Co.*, 280 S.W.2d 84, 94 (Mo. 1955), the court, in an FELA case, approved an instruction which permitted the jury to consider "such physical pain and mental suffering" as it found the plaintiff would endure in the future. Although the instrucon was not challenged on the ground that mental suffering was not compensable and the court accordingly did not address the issue under consideration here, the fact that the instruction was approved may be taken as implicit permission to recover damages for mental suffering. At the very least, *Adams v. Atchison, T. & S.F. Ry. Co.*, does not support the idea that mental anguish is not compensable.

Federal case law expressly approves the recovery of damages for mental suffering in an FELA case. In *Hayes v. New York Central Railroad Co.*, 311 F.2d 198 (2d Cir. 1962) the court discussed the issue of whether the plaintiff, a frostbite victim who had to have his feet amputated, could recover damages for emotional distress. The court held that " . . . the jury could . . . consider in its computation of damages the fear and anxiety which plaintiff experienced in knowing of the ever-present threat of amputation." 311 F.2d at 201[5,6].

The trial court in *Igsett v. Seaboard Coast Line Railroad Co.*, 332 F. Supp. 1127 (D.S.C. 1971) expressly awarded the FELA plaintiff damages for mental suffering:



> In addition to his physical pain and suffering he has suffered mental anguish, and anxiety, the shame of being transposed from an able-bodied, self-respecting working man to a pitiable, legless dependent, disfigurement, loss of sex life, humiliation and emotional strains attendant to such a deplorable condition, which would entitle him, if living, to compensation for his loss of happiness, normal life and composure. This court feels it appropriate that the award for the disability per se should include the non-pecuniary, non-pain aspects of the disabled condition, such as deprivation of a normal, full life and a chance to pursue non-economic hobbies or recreation. The court feels that an award of Fifteen Thousand ($15,000.00) Dollars is a fair and adequate amount as compensatory damages therefor.

332 F. Supp. at 1143[18].

Damages for mental suffering are recoverable in an FELA action. The next question is whether appellant [sic] adduced sufficient evidence to justify a finding by the jury that appellant's [sic] depression was caused by the December 11, 1978 fall. An FELA claimant can recover damages for mental distress only where there is competent evidence that the mental distress is attributable to the accident in question. See *Bullard v. Central Vermont Ry.*, 565 F.2d 193, 197[3] (1st Cir. 1977).

Medical testimony supports respondent's claim that his mental depression was caused by the December 11, 1978 accident. Dr. Michael Murphy, who treated respondent and testified by deposition, stated that he referred respondent to a psychiatrist because respondent was depressed and because the doctor wanted to keep respondent off narcotics. The doctor then gave his opinion on the cause of respondent's depression. "He's depressed because of his pain and his inability to work and support his family."

Dr. Robert E. Schultz, Dr. Murphy's partner and another physician who treated respondent, opined that respondent was depressed because of chronic pain and his inability to work and support his family. The physician employed by appellant admitted that respondent's chronic pain, plus his inability to engage in the "normal things in life" could contribute to his depression. Point ten is denied.

Appellant next argues that the trial court erroneously overruled appellant's objection to respondent's closing argument because the argument allegedly improperly injected punitive damages into the case. Point eleven is not well taken.

Appellant asserts that the error occurred during the following portions of respondent's closing argument:

> [MR. RITTER]
> And what you do here today when you bring that verdict form back down to the judge and he reads it is going to be heard by the railroad all of the way out to San Francisco.
>
> [MR. MORRIS]
> Object to this argument, Your Honor. This is a punitive damage - that is an argument about punitive [damages] and I object to it.
>
> [THE COURT]
> No. Overruled.
>
> [MR. RITTER]
> It is going to be heard by this railroad all of the way out to the home office in San Francisco, and I ask you to make it for an amount that's proven by the evidence that we've talked about that they'll hear about loud and clear for all times.
>
> ***
>
> But I ask you to make it as generous as you possibly can and let them know when you come back down here, "Mr. Railroad, we have done our job. Here is the price tag."



***

" . . . [T]he trial court is vested with a broad discretion in ruling on the propriety of jury arguments and determining whether prejudice has resulted." *S.G. Payne & Co. v. Nowak,* 465 S.W.2d 17, 20[5,6] (Mo. App. 1971). No abuse of discretion occurred. The argument does not expressly request the jury to punish appellant. Moreover, appellant expressly limited his request for damages to an amount proven by the evidence.

Appellant relies on *Smith v. Courter,* 531 S.W.2d 743 (Mo. banc 1976) where the court held that the plaintiff's closing argument improperly injected the issue of punitive damages. Although respondent walked dangerously close to the precipice of reversible error, he managed not to fall off the cliff. In *Smith v. Courter,* the plaintiff expressly referred to the deterrent effect which the verdict might have on others. 513 S.W.2d at 745. Here, respondent limited his arguments to appellant whose corporate headquarters are in San Francisco.

Moreover, in *Smith v. Courter,* the court acknowledges that on a cold record, it might be debatable whether the plaintiff was injecting the question of punitive damages. 531 S.W.2d at 746. Because the trial court had viewed the plaintiff's argument as exhorting the jury to consider deterrence as a factor, the reviewing court deferred to its determination. 531 S.W.2d at 747. Conversely, while it may be debatable whether plaintiff here made an improper plea for punitive damages, the trial court determined that the argument was not objectionable, and this court cannot say that the trial court abused its discretion in making that determination.

In its last point relied on appellant contends that the verdict was grossly excessive. This court has reviewed the record and determined that the evidence of respondent's lost wages, medical expenses, and pain and suffering adequately support the $1,000,000 verdict.

The judgment is affirmed.

ROBERT O. SNYDER, Judge

JOSEPH G. STEWART, Judge — Concurs

JOHN J. KELLY, JR., Presiding Judge — Concurs



## APPENDIX B

No. 66229

IN THE SUPREME COURT OF MISSOURI
No. ED 46998

September Session, 1984

Robert Wayne Dickerson,
Plaintiff-Respondent,

vs.

St. Louis Southwestern Railway Company,
Defendant-Appellant.

**TRANSFER**

Now at this day, on consideration of Defendant-Appellant's Application to transfer the above entitled cause from the Eastern District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

STATE OF MISSOURI—SCT.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session thereof, 1984, and on the 11th day of September 1984, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 11th day of September, 1984.

/s/ Thomas F. Simon, Clerk.

## APPENDIX C

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

TO: ATTORNEYS OF RECORD

FROM: JAMES A ROCHE, JR., Clerk

DATE: JULY 12, 1984

Please be advised that the following Motions For Rehearing and/or Transfer to the Supreme Court have been DENIED as of July 12, 1984:

| | |
|---|---|
| 44356 | Karen S. Williams vs. Venture Stores, Inc. |
| 44705 | Louis Szombathy vs. Ferguson Florissant School District |
| 45822 | State of Missouri vs. Willie Thomas |
| 45834 | State of Missouri vs. Larry Dewayne Usher |
| 46131 | Sandra L. Pinky vs. Dr. Michael Winer |
| 46506 | Estate of Gilford Willard, Melba Peters, et al. vs. State of Missouri |
| 46636 | Marlowe Powell vs. Norman Lines, Inc. |
| 46680 | Kralik vs. Mortgage Syndicate, Inc. |
| 46761 | State of Missouri vs. Craig Arnold |
| 46894 | State of Missouri vs. Ronald Richardson |
| 46938 | Susan Feinberg vs. Daniel Feinberg |
| 46984 | Walls vs. Walls |
| 46998 | Dickerson vs. St. Louis Southwestern R.R. |
| 47010 | A. T. Knopf vs. Harlow Richardson, et al. |
| 47036 | Lonnie Leigh vs. State of Missouri |
| 47042 | Andrew Frank, et al. vs. Environmental Sanitation, et al. |
| 47099 | State of Missouri vs. Eddie P. Waselewski |
| 47147 | Donna Frye vs. Meramec Marine, Inc. |
| 47158 | David O. Battle vs. State of Missouri |
| 47235 | Lippman, et al. vs. Desloge, et al. |



| | |
|---|---|
| 47236 | State of Missouri vs. Earl P. Inman |
| 47297 | State of Missouri vs. Darnell Duckett |
| 47303 | Jefferson Gravois Bank vs. E. J. Cunningham, J. |
| 47331 | Lois Rucker vs. Ballwin Fire Protection |
| 47347 | State of Missouri vs. Larry Edmisten |
| 47357 | Lisa Ford, a Minor, et al. vs. Goffstein Realty, et al. |
| 47369 | State of Missouri vs. Burt Rodgers |
| 473?2 | Cunningham vs. Cunningham |
| 47486 | State of Missouri vs. Stephen Mitchell |
| 47531 | State of Missouri vs. Walter Robinson, Jr. |
| 47611 | State Tax Comm. of Mo. vs. Oberjuerge Rubber Co. |
| 47632 | Wm. Richardson vs. St. John's Mercy Hosp. |
| 47649 | Tibbie Zuker Horvath, et al. vs. City of Richmond Hts., et al. |
| 47838 | State of Missouri vs. Charles E. Martin |
| 47881 | John Reid vs. City of Maplewood, Mo. |

JAR:kd

## APPENDIX D

**Rule 70.02. Instructions to Juries.**

* * *

**(b) Missouri Approved Instructions Exclude Others.** Whenever Missouri Approved Instructions contains an instruction applicable in a particular case which the appropriate party requests or the court decides to submit, such instruction shall be given to the exclusion of any other on the same subject.

* * *

**Rule 70.03. Objections to Instructions**

Counsel need not object to any instructions to be given at the request of any other party or by the court on its own motion or to the refusal of any instruction requested by such party. Specific objections to instructions shall be required in motions for new trial unless made at trial. The making of objections during trial shall not preclude making additional objections to the same or other instructions in the motion for new trial. No general objection to instruction is required.



## APPENDIX E

IN THE CIRCUIT COURT OF MISSOURI
TWENTY-SECOND JUDICIAL CIRCUIT
DIVISION NO. 8

CAUSE NO. 812-00914

Honorable Ivan Lee Holt, Judge

Robert Wayne Dickerson,
Plaintiff,

vs.

St. Louis Southwestern Railway Company,
Defendant.

**Transcript on Appeal, Volume 2, pages 722-725**

**INSTRUCTION CONFERENCE**

**[722]** (The following proceedings took place in the Judge's chambers:)

THE COURT: Gentlemen, in addition to the instruction which I've already read to the jury, I intend to read to the jury as instruction No. 2 given by the Court MAI 2.03. As Instruction No. 3 given by the Court MAI 2.02. As Instruction No. 4 offered by the plaintiff MAI 11.02.

MR. RITTER: Is that definition of negligence?

THE COURT: Yes. As Instruction No. 5 given by the Court MAI 3.01.

MR. MORRIS: Is that burden of proof?

THE COURT: Yes. As Instruction No. 6 offered by the plaintiff MAI 24.01 modified. As Instruction No. 7 offered by the defendant MAI 33.03(2). As Instruction No. 8 offered by the defendant MAI 32.07 modified. As Instruction 9 offered by the plaintiff MAI 8.02 modified.

[723] MR MORRIS: That's damages?

THE COURT: Yes. As Instruction No. 10 given by the Court MAI 2.04.

Now, Mr. Ritter, do you care to make any record on the Instructions?

MR. RITTER: You said 2.04, Judge, was the last one?

THE COURT: Yes, that's the nine of your number.

MR. RITTER: Judge, I'd like the record to show please that Instruction No. 5 is given by agreement of the parties as the burden of proof. Correct, Mr. Morris?

MR. MORRIS: So stipulated.

THE COURT: All right.

MR. RITTER: May the record show, Your Honor, that plaintiff, prior to your indicating which instruction you were going to read, offered MAI—mark these, A, B and C.

THE COURT: Which—oh, yes. A. is assumption of risk. B. is a damage instruction, C. is a damage instruction, both of which are erroneous, and so is D.

MR. RITTER: May the record show that plaintiff has offered Instructions A, B, C and D, and that those were refused by the Court?

THE COURT: Yes. Are you objecting to my refusal?

MR. RITTER: Yes, sir.

THE COURT: Okay. All right, Mr. Morris, do you care to make any record on the Instructions?

[724] MR. MORRIS: Your Honor —

THE COURT: Off the record.

(Discussion was had off the record.)

MR. MORRIS: Let the record show that on behalf of the defendant, that the defendant objects to the giving of instructions tendered by the plaintiff with the exception of Instruction No. 5, I believe that was, which has been agreed to—

THE COURT: All right.

MR. MORRIS: — on behalf of the plaintiff. And further, the defendant objects to the action of the Court in refusing defendant's tendered instructions lettered E. through H.

THE COURT: Very well. Those objections will be overruled. As to the refused Instruction A, the Court is of the opinion that assumption of risk is not in the case and that the instruction should not be given. As to B, Instructions B and C, they're refused because they make no mention of contributory negligence diminishing the damages, and therefore are erroneous since contributory negligence is being given. As to Instruction No. D, the Court is giving a damage instruction, Instruction No. 9, which is more accurate than refused Instruction D, in that it includes, "After the fall on December the 11th," the words mentioned in the evidence which is the proper way to give it under MAI. As to instructions, defendant's refused Instructions E through H, none of them are in MAI, and they are refused for that reason and because they're simply lectures to the jury and add nothing of any merit to the issues to instruct on.

* * *

## APPENDIX F

### INSTRUCTION G

If you find in favor of Plaintiff and decide to make an award for any loss of earnings in the future, you must take into account the fact that the money awarded by you is being received all at one time instead of over a period of time extending into the future and that Plaintiff will have the use of this money in a lump sum. You must, therefore, determine the present value or present worth of the money which you award for such future loss.

## APPENDIX G

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

Cause No.
Division No. 812-09941

**MOTION OF DEFENDANT ST. LOUIS SOUTHWESTERN RAILWAY COMPANY FOR JUDGMENT IN ACCORDANCE WITH ITS MOTION FOR A DIRECTED VERDICT AT THE CLOSE OF ALL THE EVIDENCE, OR, IN THE ALTERNATIVE, FOR A NEW TRIAL**

Comes now Defendant, St. Louis Southwestern Railway Company, and, for its Motion for Judgment on its Motion for Directed Verdict at the Close of All the Evidence previously filed, or, in the Alternative, for a New Trial, states as follows:

* * *

10. The Court prejudicially erred in refusing the following instructions tendered by Defendant because said instructions are legal, valid instructions stating Defendant's rights under the Federal Employer's Liability Act and the federal common law pertaining thereto:

a. Instruction G, the present value instruction.

Said instruction is particularly important because of Plaintiff's young age, his intent to work until age 65 or 70, and the very great future wage loss in view of the evidence that his current salary would be over $29,000.00 per year if he were still working.

* * *

12. Instruction No. 9. Plaintiff's damage instruction was erroneously given by the Court to the prejudice of Defendant in that said instruction uses the language "fall on December 11, 1978." By use of the word "fall" said instruction assumed as

true Plaintiff's evidence that he did, in fact, fall as he claimed in his testimony. Further, by use of the words "mentioned in the evidence" the instruction directs the jury that the fall occurred for the reasons claimed by Plaintiff, namely, that the train moved, a hotly disputed issue.

Further, said instruction erroneously omits the word direct, or some other limiting word or phrase such as "in whole or in part," in the phrase "as a result of the occurrence." The federal common law pertaining thereto and the Federal Employers' Liability Act do not permit indirect or remote damages from Defendant's negligence. They provide that the Defendant shall be liable in *damages* for *injury* resulting in whole or in part from the negligence of the railroad. In short, Instruction No. 9 and M.A.I. 8.02 are clear misstatements of the law permitting the jury to find Defendant liable for indirect, remote, speculative and conjectural damages.

This instruction is limited by the M.A.I. Notes on Use, thus by Supreme Court Rule, to Federal Employers' Liability Act cases and, hence, is discriminatory against Federal Employers' Liability Act defendants. In compelling the use of said instruction, the Supreme Court of Missouri has deprived Defendant of its rights under the equal protection of laws provision of the United States Constitution, Fourteenth Amendment, and Missouri Constitution, Article I, Section 2, and has deprived Defendant of its property without due process of law in violation of Defendant's rights under the Missouri Constitution, Article I, Section 10, and has denied Defendant its rights under the Federal Employers' Liability Act, 45 U.S.C.A., Sections 51, *et seq.*, in that Defendant is liable in damages only for injury (or death) resulting in whole or in part from its negligence, in violation of Defendant's rights under Article 6, Clause 2 of the United States Constitution.

* * *

26. The Court prejudicially erred in overruling Defendant's objection thereto and permitting the Plaintiff's counsel to argue

that the Plaintiff's lost wage in the future is equal to the number of years Plaintiff has testified that he intended to work times his current wage rate. Said figure was calculated by Plaintiff's counsel to be approximately $1 million dollars. Said argument is contrary to the law pertaining to FELA cases established by the United States' Courts in that it fails to reduce the Plaintiff's claim for future wage loss to its present value. Under federal law, loss of wages in the future under an FELA claim must be reduced to present value.

* * *

28. The verdict was excessive and against the rule of uniformity. Said verdict was excessive by the sum of $700,000.00 and the Court should enter a remittitur in the amount of $700,000.00.

29. The verdict was excessive, so excessive as to be the result of passion and prejudice and can only be corrected by action of the Court in setting aside the judgment and remanding the case for a new trial.

* * *

## APPENDIX H

IN THE CIRCUIT COURT
CITY OF ST. LOUIS

Filed March 4, 1983

Clerk, Circuit Court

Robert W. Dickerson,
Plaintiff

vs.

St. Louis Southwestern Railway Company,
Defendant

No. 812-09941 March 4, 1983

**MEMORANDUM FOR CLERK**

Motion of Defendant for Judgment in Accordance with its Motion for a Directed Verdict at the Close of all the Evidence, or, in the Alternative, for a New Trial both denied.

/s/ I. L. Holt, Jr., Judge

cc: Clerk
Court
Mr. Ritter
Mr. Morris



## APPENDIX I

POINTS RELIED ON BEFORE
THE MISSOURI COURT OF APPEALS

**II**

**The Trial Court Erroneously Refused To Submit A Present Value Instruction To The Jury Because An Award To Plaintiff Not Reduced To Its Present Value Or Worth Is Prejudicially Inflated In That Every FELA Defendant Has A Fixed, Substantive Federal Right To Have The Jury Reduce The Award To Plaintiff To Its Present Value Or Present Worth.**

**IV**

**The Trial Court Erred In Submitting To The Jury Plaintiff's Instruction No. 9, The Damage Instruction [M.A.I. 8.02], Because It Should Not Have Been Modified To Describe The Compensable Event As Plaintiff's "Fall On December 11, 1978, Mentioned In The Evidence," In That Paragraph 2, Notes On Use For M.A.I. 8.02 States That Such Modification Should Be Made Only When And If A Defendant Is Claiming That A Different Event Caused Plaintiff's Injury And Here Defendant Did Not Claim Or Attempt To Show That Another Event Caused Plaintiff's Alleged Injuries, And Furthermore, Defendant Was Prejudiced Because The Instruction Assumed As True Plaintiff's Evidence That He Did In Fact Fall And It Directed The Jury That The Fall Occurred For The Reasons Claimed By Plaintiff.**

**VI**

**The Trial Court Erred In Overruling Defendant's Motion For New Trial, Paragraph 12, To The Effect That Instruction No. 9 [The Damages Instruction - M.A.I. 8.02] Deprived Defendant Of Equal Protection Under The Law Under The United States Constitution And The Missouri Constitution**

**Because M.A.I. Fails To Distinguish Between Or Classify Wrongful Death FELA Defendants And Personal Injury FELA Defendants On A Rational And Reasonable Basis In That M.A.I. 8.02 [Here Instruction No. 9] Does Not Require That Plaintiff's Damages Result Directly Or Proximately From Plaintiff's Injury Whereas M.A.I. 8.01 (The Damages Instruction For Wrongful Death) Requires That Plaintiff's Damages Be Directly Or Proximately Caused By Plaintiff's Injury.**

**XII**

**The Trial Court Erroneously Overruled Defendant's Motion For New Trial, Paragraphs 28 And 29, To The Effect That The One Million Dollar Verdict Was Excessive Because It Was Without Support Of The Record And Due To An Impassioned And Inflamed Jury In That Much Improper Evidence On Damages Was Admitted Into Evidence And That The Jury Was Subjected To Plaintiff's Sympathy-Provoking Scenarios.**

IN THE MISSOURI SUPREME COURT

No. 66229

Robert Wayne Dickerson,
Plaintiff-Respondent

vs.

St. Louis Southwestern Railway Company
Defendant-Appellant,

**ST. LOUIS SOUTHWESTERN RAILWAY COMPANY'S APPLICATION FOR TRANSFER AFTER OPINION BY THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT**

COMES NOW appellant, St. Louis Southwestern Railway Company and for its Application for Transfer for the Missouri Court of Appeals, Eastern District, to the Missouri Supreme Court, pursuant to Rule 83.03 states:

* * *



3. Appellant now asserts the following grounds for transfer:

* * *

(b) The Court of Appeals affirmance of the trial court's refusal of appellant's present value instruction to the jury is a question of general interest and importance. (Slip Op. at 5.)

* * *

(d) The Court of Appeals' Opinion affirming the use of MAI 8.02 and MAI 8.01 despite the denial of due process to personal injury FELA defendants due to the distinction in the causal language in those instructions (8.01 requires no "direct" link between injury and damage whereas 8.02 does) illustrates the need for clarification of law in this area.

* * *

(f) The Court of Appeals' Opinion raises a question of general interest and importance in that it affirmed an excessive verdict in the amount of $1,000,000, when the evidence did not warrant this and where plaintiff's counsel made impermissible closing argument despite repeated warnings by the trial court, (Slip Op. at 12-13). This is a case where plaintiff was not paralyzed nor even immobilized, but his claim involves only a very bad result from a lumbar ruptured disc and his inability to work because of that poor result.

## APPENDIX J

### 8.02 Damages - F.E.L.A. - Injury to Employee

* * *

### Committee's Comment (1978 New)

This instruction is used only in an F.E.L.A. case wherein the employee sustained injury. It is a duplication of MAI 4.01 with two exceptions. The word "direct" is deleted from the fifth line of MAI 4.01. This is required in an F.E.L.A. case so that the instruction complies with the correct substantive law, *Wilmoth v. Rock Island Ry.*, 486 S.W.2d 631 (Mo. 1972); *Crane v. Cedar Rapids & Iowa City Ry. Co.*, 395 U.S. 314 (1969); and *Rogers v. Mo. Pac. Ry.*, 352 U.S. 500 (1957).

## APPENDIX K

### Rule 83.03. Transfer by Supreme Court After Opinion by Court of Appeals

In any Case in which a motion for rehearing has been overruled and an application for transfer under rule 83.02 has been denied, the case may be transferred by order of this court on application of a party for any of the reasons specified in rule 83.02, or for the reason that the opinion filed is contrary to a previous decision of an appellate court of this state. Application for such transfer shall be filed in this court within 15 days of the date on which transfer was denied by the court of appeals. Motions for reconsideration of the court's action in refusing an application for transfer shall not be accepted or filed.



## APPENDIX L

**[738]** THE COURT: I assume that's what he did.

MR. RITTER: Yes, sir.

MR. MORRIS: That's all he's proven. Now, I object that there is no evidence for these mathematical calculations and projections. I don't know where they came from. I don't know how he arrived at them. Likewise, I object that any of these type of damages have to be, under the federal F.E.L.A. law, reduced to present value. There has to be expert testimony if he's going to do these kinds of projections.

THE COURT: No, I don't think so, if he's taking the expectancy and the wages that he was making I think he can argue that. Overruled.

MR. RITTER: Thank you, Your Honor.

MR. MORRIS: How about the projections, Your Honor, **[739]** the other, the projections as to the millions of dollars? He's got two million, three million dollars down there. I'd like for him to tell us what he is going to argue before he does so I can make a record.

THE COURT: I understood from what he said he took the years' expectancy times the wages.

MR. MORRIS: That's not the two-million-dollar figure.

MR. RITTER: Judge, there are two sets of figures. One is the future expectancy based upon his earnings today to age sixty-five and age seventy. The other set of figures assumes a five percent wage increase, which the evidence has shown through Mr. Miskell the men had been receiving at least a five percent increase per year over the years that he's worked there, and that creates evidence from which the jury can believe that would continue.

MR. MORRIS: I object to that, Your Honor.

THE COURT: No, I don't think that because—

MR. MORRIS: It requires expert testimony.

MR. RITTER: That's why I put the evidence in, Judge.

MR. MORRIS: That requires expert testimony, Your Honor. There is no possible way—

MR. RITTER: Judge, Mr. Miskell was listed as the expert on that. I read his disposition and he testified.

MR. MORRIS: He is no economic expert. All he did was tell about the past wages, Your Honor.

**[740]** THE COURT: Yes. I don't think you can argue that there would be a five percent increase every year for the rest of his expectancy. I think that's speculative.

MR. RITTER: Judge, I'm not going to argue that there is going to be a five percent wage increase. All I would like to argue and propose to argue is that the evidence has shown that he did have a five percent increase for all the years that he was there, at least five percent.

THE COURT: Well, I think you can argue that because it's shown that, but I don't think you can take that and multiply it out.

MR. RITTER: If the—

MR. MORRIS: I object to that, Your Honor.

THE COURT: Yes, and I'll sustain it to that portion of it.

(The proceedings returned to open Court.)

MR. MORRIS: I object to the use of the board if those other figures are on there.

THE COURT: All right. He says he's not going to use them.



MR. RITTER: Ladies and gentlemen, if the man is disabled, based upon what he was earning when they laid him off and canceled all of his rights, if he continued to earn the wage rate as of March, 1981, throughout his working life to age sixty-five, now this is a large figure, but if you take **[741]** anybody's wages and multiply it out during the time that they have left to work it's going to be a large figure; to age sixty-five this man would have earned $902,620. To age seventy, which they're entitled to work to now under the new federal law, he would have earned $1,051,420. Those figures assume that he would have had no raises at all for the next thirty-four years.

Now, if he had—the evidence showed from Mr. Miskell that their wages were going up five percent a year at least over the years Mr. Dickerson worked there. And I think you can see that if you assume he would continue to have had those raises, if he was able—

MR. MORRIS: Wait a minute, Your Honor. I'm going to object to that. This gets into the area of speculation.

MR. RITTER: Just mentioning a figure, Your Honor.

THE COURT: All right, sustained.

MR. RITTER: That that figure would be very large, very large indeed. I'm not allowed to multiply it out for you. 1.05 times—

MR. MORRIS: Object to that, Your Honor.

THE COURT: Sustained.

MR. RITTER: Now—

MR. MORRIS: Ask that it be stricken.

MR. RITTER: That's a million dollars if he never got a raise. Obviously far more if they got raises. Now, it's up **[742]** to the jury to find how much more that would have been. Now, that's

what they have taken out of his pocket. And the evidence has shown that he's now cut off, no more rights, no pension, no retirement, nothing. No insurance, no medical payment, nothing. It's all on him for the rest of his life. Now, that's well over a million dollars right there, and you can figure out how much it would be if he would have gotten the raises.

* * *